

Attachment

## INTERIOR AGREEMENTS WITH RESPONSIBLE PARTIES TO FUND NATURAL RESOURCE DAMAGE ASSESSMENT ACTIVITIES

**Issue:** Using the DOI NRDAR Fund to support enforceable agreements between DOI and Responsible Parties for DOI to conduct NRDA assessment activities (including those aspects of restoration planning conducted as part of an assessment).

**Background:** As both trustees and responsible parties (RPs) have become more practiced in conducting natural resource damage assessments (NRDAs) pursuant to the applicable hazardous substance and oil NRDA regulations, the trustees and RPs have realized that there may be mutual advantages in entering into agreements through which RPs fund trustee-conducted assessment and/or restoration planning (conducted as part of the assessment process, prior to settlement) activities as they occur.

These cooperative trustee-RP efforts are supported by and consistent with both the hazardous substance NRDA regulations, 43 CFR Part 11, and the oil NRDA regulations, 15 CFR Part 990. Both sets of regulations require trustees to invite the participation of potentially responsible parties in performing the assessment. See 43 CFR § 11.32(a)(2)(iii)(A); 15 CFR § 990.14(c). Both regulations also provide that the authority to decide the nature and extent of RP participation is retained by the trustees. 43 CFR § 11.32(d); 15 CFR § 990.14(c)(4); see Ohio v. U.S. Department of the Interior, 880 F.2d 432, 466-67 (D.C. Cir. 1989).

For oil spills covered by the Oil Pollution Act of 1990, the U.S. Coast Guard National Pollution Funds Center (NPFC) has issued procedures which provide that "[w]here possible, the trustees should first seek [assessment initiation] funding from the responsible parties." *Technical Operating Procedures for Providing Funding to Natural Resource Trustees to Conduct an Initiation of Assessment of Natural Resource Damages under the Oil Pollution Act of 1990*, at 1. (USCG-NPFC, July 1995) ("*OPA Technical Operating Procedures*"). Further, the NPFC advises that "Trustee funding requests to RPs should be clear, and fully documented (including the RP's response or lack thereof) for future reference." *Id.* The NPFC will fund a trustee assessment initiation request using funds from the Oil Spill Liability Trust Fund (OSLTF) when "time is of the essence and consultation with RP is not feasible or would be clearly futile, or when the RP declines or is unable to provide the requested funding." *Id.* In many cases, the RP, when faced with the added costs of transacting through the OSLTF (33% overhead) and realizing the opportunities to have front end input into the trustees NRDA actions, is willing to negotiate an MOA to provide NRDA funding. This funding usually covers the preassessment as well as the assessment and restoration planning phases of the NRDA. OSLTF assessment initiation funds are limited to preassessment actions only.

Whether for hazardous substance or oil spill NRDAs, MOAs with RPs to fund trustee assessment activities must be consistent with the Anti-Deficiency Act, 31 U.S.C. § 1341, and must be based on proper Departmental authority to enter into agreements providing for advance payments or repayment for costs incurred.

The Solicitor's office has determined that the Department has the authority to enter into agreements with RPs for the RPs to fund assessment activities conducted by the Department or its bureaus (including restoration planning conducted as part of an assessment). 43 U.S.C. § 1474b. These agreements may be structured so that RPs provide funds in advance, or as a repayment for DOI natural resource damage assessment activities. Furthermore, the Department has the authority to transfer monies from the NRDAR Fund to bureaus within the Department to carry out assessment activities. 43 U.S.C. § 1474b-1. However, that authority does not extend to reimbursing bureaus for expenditures for assessment activities paid for from the bureaus' own appropriated funds. Therefore, in order to comply with the Anti-Deficiency Act, and the other authorities, bureaus wishing to conduct RP-financed assessment activities must first receive an advance from the NRDAR Fund, either from available (i.e., not otherwise dedicated) monies appropriated to or received by the NRDAR Fund or monies paid in advance to the Fund by the RP. If an RP agrees to pay amounts into the NRDAR Fund in advance, the Fund does have the capability of returning to the RP any monies in excess of those needed for the assessment activities.

#### **Proposed Solution:**

Develop and adopt a model enforceable MOA for RP funding of Departmental assessment activities, and develop and adopt accounting procedures and guidelines that will facilitate access to the NRDAR Fund, minimize the amount of NRDAR Fund monies required to comply with the Anti-Deficiency Act pending receipt from RPs, and ensure proper documentation.

Guidance will include instructions to requesting bureaus for both depositing of RP monies given in advance of NRDA work and procedures for using existing NRDAR Fund monies with promised RP repayment (see attached 'Initiation of NRDA \$\$\$\$ - PRP' flow chart - Lotus file 'prpinit2.wk3 in the electronic distribution). Procedures for promised repayment by RPs will require certification from the Fund manager that adequate uninvested monies to cover the amount needed are available. Allowable charges and accounting procedures for oil spill assessment activities will be those outlined in *OPA Technical Operating Procedures*, except that scope of activities covered by the agreements need not be limited to the "initiation" activities allowed in the *OPA Technical Operating Procedures*, because the OPA provisions limiting the OSLTF to payment of initiation costs (without further appropriation) do not apply to RP-funded trustee assessment activities. For hazardous substance assessments, the accounting procedures contained in the *Superfund Financial Management and Recordkeeping: Guidance for Federal Agencies* (EPA, January 1989), should be used as guidance to the extent relevant. Examples of requesting forms and notice form of anticipated deposit into the NRDAR Fund are attached.

The Department should consider what incentives could be made available to RPs to pay monies to the NRDAR Fund in advance, rather than repay the Fund after assessment costs have been incurred. Advance payments reduce or eliminate the need to spend other Fund monies "up front" for assessment activities, pending repayment. The Department's policy should be to obtain agreements to obtain advance payments from RPs wherever possible.

It is recommended that \$200,000 be made available annually in order for this project to be fully successful.

## **Procedures for Implementation**

The Initiation funding be considered as a project - submitted to the NRDAR Task Force for their concurrence - and then forwarded to the DAS group for approval.

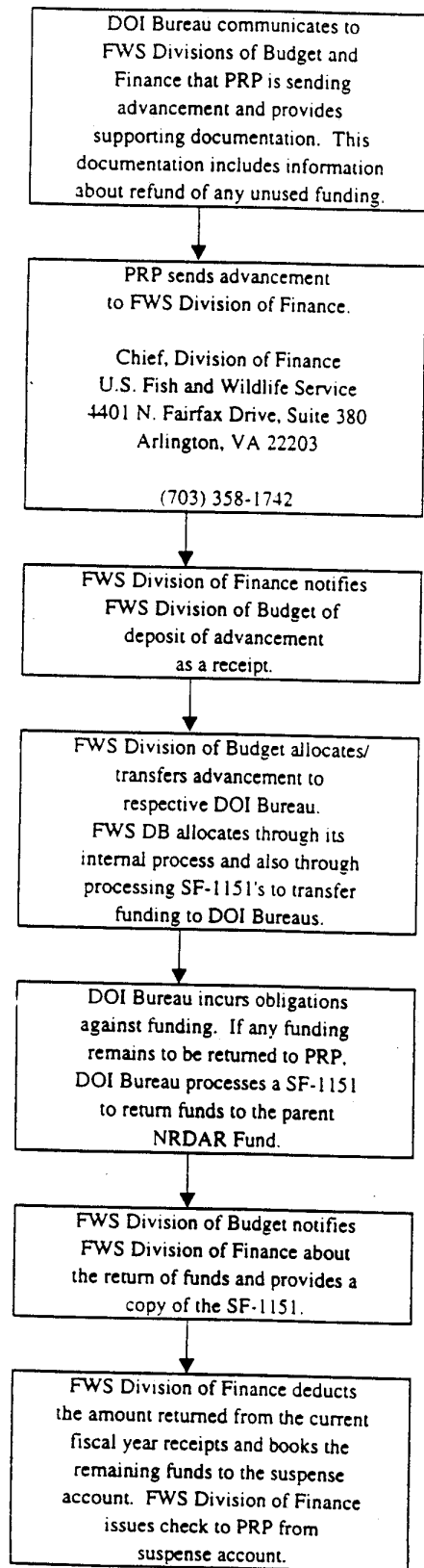
The Task Force identifies a member who will sign the NRDAR Fund Request form as the "Authorizing Official".

### **Steps**

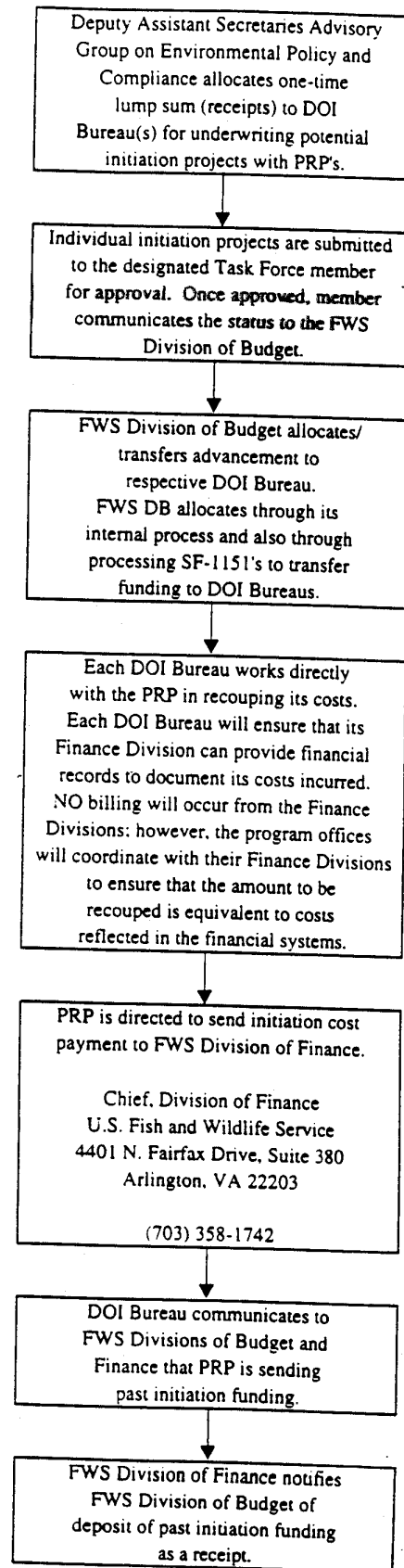
- Trustee approaches the RP for funding to support NRD assessment activities - the RP agrees to fund the trustee efforts - either by advance of funds (see flow chart option #1) or by quarterly repayment of costs incurred (see flow chart option #2).
- The RP will advance funds, option #1.  
The RP wants to repay trustee expenses on a quarterly basis, option #2.
- Trustees sign MOA with RP. (Attachment 3 is a sample MOA, a model enforceable memorandum of agreement appropriate for a typical oil spill incident. Prior to submission of a proposed MOA to an RP, the trustee should review the MOA to ensure its application to specific site and incident characteristics of the situation at hand in coordination with the OEPC and Solicitor's Office participants.)
- NRDAR Fund Request Form is filled out and forwarded with a copy of the signed MOA to the NRDAR bureau Task force representative who will sign the form and forward it to NRDAR Fund Manager (FWS Budget). The Fund Manager confirms by signature that funds are available, then forwards the Request Form to the Authorizing Official who also signs the form authorizing use of NRDAR funds.
- The Authorizing Official sends the original back to NRDAR Fund Manager, and provides copies to the other Task Force members.
- Specified funds are released to the requesting bureau. NRDAR Fund and internal bureau financial management procedures apply.

## INITIATION OF NRDA \$\$\$\$ - PRP

### I. ADVANCEMENT OF FUNDING



### II. NO ADVANCEMENT OF FUNDING



Attachment 1

**DEPARTMENT OF THE INTERIOR  
NATURAL RESOURCE DAMAGE ASSESSMENT AND RESTORATION FUND  
REQUEST FOR FUNDING**

Case Name:  
Date of Request:  
Summary of Needs:

Amount of Request:  
Bureau:  
Bureau Contact (and phone number):  
Responsible Party:  
Bureau Account Number:

Proposed NRDA Action Budget (by quarter):  
1-3 months:  
4-6 months:  
7-9 months:  
10-12 months:

I certify that this budget is required for the work outlined in the attached signed MOA and that the Responsible Party (RP) has agreed that they will accept responsibility to repay allowable incurred costs to the Department for these obligations.

\_\_\_\_\_  
Bureau NRDA Fund Representative

\_\_\_\_\_  
Date

I certify that funds are sufficient to cover the amount of requested funds agreed to by the bureau and the Responsible Party, and are currently available in the DOI-NRDA Fund.

\_\_\_\_\_  
NRDA Fund Manager

\_\_\_\_\_  
Date

This application complies with established procedures.

\_\_\_\_\_  
Chair, NRDA Fund Task Force

\_\_\_\_\_  
Date

Note: This MOU is a bit lengthy -  
but it involves multiple trustees

Attachment 3

SAMPLE MODEL ENFORCEABLE MEMORANDUM OF AGREEMENT

NATURAL RESOURCE DAMAGE  
MEMORANDUM OF AGREEMENT

This Memorandum of Agreement ("MOA") is made and entered into by and between the United States Department of Defense, acting through the Department of the Navy as represented by the Commander, Naval Base, Pearl Harbor ("the Navy"); the United States Department of Commerce, acting through the National Oceanic and Atmospheric Administration ("NOAA"); the United States Department of the Interior, acting through the Office of Environmental Policy and Compliance ("DOI"); the State of Hawaii, acting through the Department of Health ("the State"); and AAA Products Company Hawaii Refinery ("AAA"). Hereinafter, the Navy, NOAA, DOI, and the State shall be collectively referred to as the "Trustees." AAA and the Trustees are hereinafter referred to collectively as "the parties."

RECITALS

1. On or about (spill date), 1996, AAA learned that a pipeline, belonging to and operated by AAA and that carries a formulation of #6 Bunker fuel between the AAA Hawaii Refinery in \_\_\_\_\_, \_\_\_\_\_, Hawaii, and the AAA Marketing Terminal in \_\_\_\_\_, \_\_\_\_\_, Hawaii, was discharging product into the environment. Product was discharged from the pipeline onto the ground and thence into \_\_\_\_\_ Stream and Pearl Harbor.
2. The waters and shorelines of Pearl Harbor provide: recreation and education services to resident and visitors; habitat for biota, including endangered, threatened, migratory, commercial, recreational, and subsistence species; recreational, commercial and industrial services to a number of entities; and support to the national defense mission performed by the Navy.
3. The discharge of product from the pipeline, discovered on or about (spill date), 1996 (the "Incident"), constitutes a discharge of oil into waters of the United States and is, therefore, a matter addressed under the Oil Pollution Act of 1990, 33 U.S.C. Sections 2701-2761 ("OPA") and the National Contingency Plan (NCP), 40 C.F.R. §§ 300.600 et seq. Under OPA and Executive Order 12777, the Secretary of Defense, the Secretary of the Interior, the Administrator of NOAA, and the State are designated trustees of natural resources, which may have been, or may be, injured, lost or destroyed as a result of the Incident. By Hawaii Revised Statutes ("H.R.S.") Chapter 128D, the Governor of the State of Hawaii designated the Director of the State Department of Health ("DOH") as a trustee of natural resources, which may have been, or may be, injured, lost or destroyed as a result of the Incident. The Navy, NOAA, the National Park Service (a bureau within the DOI), the Fish and Wildlife Service (a bureau within the DOI), and the State manage or have jurisdiction over resources actually or potentially affected by the discharge.

4. AAA agrees that the Trustees have jurisdiction to pursue restoration, replacement, rehabilitation, or acquisition and such other acts to the extent authorized and appropriate under OPA, the NCP, and H.R.S. Chapter 128D. The Navy, NOAA, the DOI, through its bureaus, and the State with the full cooperation of AAA, have commenced the assessment of actual or potential injuries to their trust resources as a result of the discharge, in order to determine, as provided in 15 C.F.R. Part 990, Subpart D-Preassessment Phase, and H.R.S. 128D, whether conducting restoration planning is appropriate.

5. AAA desires to continue its participation in damage assessment, restoration planning, restoration implementation and restoration monitoring as appropriate, and has agreed to fund certain costs of the Trustees in undertaking these activities in accordance with the terms of this MOA. This MOA documents the agreement of the parties regarding this matter.

6. This MOA is intended to promote the coordination of activities between the Trustees, to delineate the participation of AAA in these activities, to delineate the obligations of the Parties pursuant to this MOA, and to accelerate the planning and implementation of restoration. This MOA does not alleviate or limit and responsibility AAA may have in regard to other removal or remediation activities apart from natural resource damage activities.

Now, therefore, in consideration of the foregoing recitals, and for the agreements recited below, the parties hereby agree as follows:

#### AGREEMENTS

1. The parties will form a group of technical experts known as the "Technical Working Group" ("TWG") to cooperatively perform the following damage assessment and restoration planning activities:

a. Review current response data and existing literature applicable to the discharge to determine which natural resources and resource services may have been injured, lost or destroyed as a result of the Incident.

b. Review current response data and existing literature applicable to the discharge to prepare:

- (1) characterization of the discharge and environmental setting;
- (2) determination of actual or potential exposure; and
- (3) determination of actual or potential injuries;

c. Following the review of relevant data, the TWG will develop a strategy and budget for the following activities:

- (1) quantification of injuries, including risks to natural resources and lost services;
- (2) determination of the value of interim lost use;
- (3) development of alternative primary and compensatory restoration measures;
- (4) evaluation of alternative primary and compensatory restoration measures;
- (5) development of a draft restoration plan;
- (6) conduct of a public review of the draft restoration plan, including a response to public comments;

(7) development of a final restoration plan, including implementation and monitoring costs as appropriate.

d. The parties agree to work in good faith to reach agreement on each of the damage assessment and restoration activities listed above. If the parties cannot reach agreement on restoration due to a lack of consensus on the actual and potential injuries to resources and services, the parties will work together to design a cost-effective cooperative study to resolve the issue. AAA will fund the agreed-upon cooperative study. AAA will not withdraw from its obligation to fund the agreed-upon cooperative study so long as the study is conducted consistent with the agreed study plan and any agreed modifications thereto. If AAA refuses to fund the agreed-upon cooperative study, the Trustees reserve the right to fund the study and to seek reimbursement for such costs.

2. The parties shall each designate representatives to the TWG in writing to each other within ten (10) working days after executing this MOA. The parties shall work cooperatively to ensure that each member of the TWG does not duplicate the expertise of other members, so as to minimize the costs of the TWG. The membership of the TWG can be expanded or reduced as the TWG deems necessary to achieve its purposes.

3. Each Trustee may periodically submit to AAA an accounting of the reasonable costs it incurs in participation on the TWG, but, in any event, each Trustee shall submit a final accounting of its costs within 60 days after the earlier of (1) completion of the work covered by this MOA or (2) termination or expiration in accordance with paragraph 5 of this MOA. The accounting shall include backup documentation such as time sheets, travel vouchers and receipts for expenses. AAA shall pay the costs submitted to an account or accounts as directed by each Trustee, within 30 days after an accounting is submitted by that Trustee. The costs to which the Trustees are entitled under this MOA are the reasonable costs of the activities described herein, not previously reimbursed by AAA, that were incurred by the Trustees on or after (spill date), 1996. These accounting of Trustees' costs should be directed to the following AAA address:

Finance Manager, Hawaii Refinery  
91-480 Malakole Street  
Kapolei, Hawaii 96707-1807

4. AAA agrees that it will reimburse the reasonable costs of the activities described herein up to the following initial funding ceilings for each of the following participating Trustee representatives pursuant to this MOA. These initial funding ceilings are agreed upon in order to allow the Trustees to set up a reimbursable account and avoid any potential for violation of the Anti-Deficiency Act:

Department of Defense

Department of the Navy

Commander, Naval Base Pearl Harbor: SXX,000.00

Department of Commerce

National Oceanic and Atmospheric Administration

SXX,000.00

Department of the Interior

Fish and Wildlife Service:

SXX,000.00



National Park Service:	SXX,000.00
Office of Environmental Policy and Compliance and Office of Policy Analysis:	SXX,000.00
State of Hawaii	
Department of Health	SXX,000.00
Department of Land and Natural Resources	
Division of Aquatic Resources:	SXX,000.00
Division of Forestry and Wildlife:	SXX,000.00

AAA's payment obligation, however, shall be limited to the payment of reasonable costs which are or have been properly incurred according to the terms of this MOA and which are documented in accordance with this MOA. Each Trustee agrees to notify AAA in writing within thirty (30) days if its costs reach ninety percent (90%) of the amounts listed above and if the Trustee will be requesting a new funding ceiling. The parties agree to review the costs actually incurred and work in good faith to determine whether the funding ceiling listed above should be adjusted. Notwithstanding the foregoing, however, nothing herein shall be construed to limit the obligation of AAA to the above-specified initial funding ceilings.

5. This MOA shall remain in effect until the purposes set forth in Paragraph 1 are accomplished, but shall not extend beyond two (2) years from the date of the execution of this MOA by AAA unless the parties otherwise agree in writing. This MOA may be terminated by the Trustees, acting jointly, or by AAA after providing thirty (30) days notice in writing to the other parties. Furthermore, any Trustee may withdraw from this MOA at any time on thirty (30) days notice in writing to the other Trustees and to AAA, provided however that if any Trustee withdraws, AAA may terminate this MOA as of the date of the Trustee's withdrawal. Upon termination by all the Trustees or by AAA, or upon expiration, this MOA shall be of no further force or effect, except that AAA shall remain obligated to pay all the costs of the Trustees incurred through the effective date of the termination or expiration.

6. Nothing in this MOA is intended to be nor should it be construed to be a limitation on any Trustee's authority to pursue any other method of recovery or to pursue any claim. This determination remains the sole discretion of each Trustee; provided however that a Trustee must terminate this MOA pursuant to paragraph 5 in order to pursue any natural resource damage claim related to this Incident.

7. The Trustees agree that the determinations described in paragraph 1 shall be based on the consensus of all the Trustees unless otherwise expressly noted in this MOA.

8. Any notice or other writing to be delivered hereunder shall be mailed or faxed to the following persons at the addresses or fax numbers listed below:

For the Navy:

\_\_\_\_\_,  
Commander, Naval Base, Pearl Harbor  
Box 110  
Pearl Harbor, HI 96860-5020  
FAX: (808) 471-\_\_\_\_

For NOAA:

\_\_\_\_\_,  
National Marine Fisheries Service, SWR  
Pacific Area Office  
2570 Dole Street, Room 106  
Honolulu, HI 96822-2396  
FAX: (808) 973-\_\_\_\_

For DOI:

\_\_\_\_\_,  
Regional Environmental Officer  
Department of the Interior  
Office of Environmental Policy and Compliance  
600 Harrison Street, Suite 515  
San Francisco, CA 94107-1376  
FAX: (415) 744-\_\_\_\_

For the State:

\_\_\_\_\_,  
Deputy Director for Environmental Health  
Department of Health, State of Hawaii  
1250 Punchbowl Street  
Honolulu, Hawaii 96813  
FAX: (808) 586-\_\_\_\_

For AAA:

\_\_\_\_\_,  
Manager, Hawaii Refinery  
\_\_\_\_\_, Street  
\_\_\_\_\_, Hawaii 96\_\_\_\_  
FAX: (808) \_\_\_\_-\_\_\_\_

9. The undersigned signatories represent and warrant that they are duly authorized to enter into this MOA on behalf of the parties they represent and that upon their signature, this MOA shall become the binding obligation of the parties they represent. This MOA may be signed in counterparts. After AAA has executed this MOA, this MOA shall be effective between AAA and each Trustee as of the date of the Trustee's signature. In the event that all Trustees have not executed this MOA on or before September 5, 1996, AAA may elect to terminate pursuant to this provision, such termination shall be effective as of September 5, 1996.

In witness whereof, the Navy, NOAA, the DOI, the State and AAA set forth their signatures on the following dates:

AAA Products Company

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: Manager, Hawaii Refinery

Date: \_\_\_\_\_, 1996

The State of Hawaii

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: Deputy Director for Environmental Health  
Department of Health, State of Hawaii

Date: \_\_\_\_\_, 1996

The Department of the Interior

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: Director, Office of Environmental Policy and Compliance,  
Office of the Secretary

Date: \_\_\_\_\_, 1996

The National Oceanic and Atmospheric Administration

By: \_\_\_\_\_

Name: \_\_\_\_\_, Authorized Official

Title: Director, Office of Ocean Resources, Conservation and Assessment

Date: \_\_\_\_\_, 1996

Department of Defense

For the Secretary of the Navy

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: Rear Admiral, U.S. Navy  
Commander, Naval Base, Pearl Harbor

Date: \_\_\_\_\_, 1996